No. 87-645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

F. CLARK HUFFMAN, *et al.*,
Petitioners,

v.

WESTERN NUCLEAR, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR AMICI CURIAE UNITED STATES SENATORS JEFF BINGAMAN, PETE V. DOMENICI, JAKE GARN, ORRIN G. HATCH, ALAN K. SIMPSON, AND MALCOLM WALLOP IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an agency may refuse to take action commanded by an Act of Congress where the agency determines that changed circumstances occurring since enactment of the statute would make compliance with the command of the statute unwise as a matter of policy.

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INTEREST OF AMICI

Amici curiae are United States Senators who have an interest in presenting their views concerning the separation of powers between Congress and the Executive Branch, and file this brief pursuant to the Court's Rule 36 with the written consents of petitioners and respondents.[1] Amici believe that the position taken by petitioners in this litigation disregards the power of Congress to declare the nation's policy regarding the need to assure the viability of the domestic uranium industry, and hence support the position of respondents.

[1] The consents are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

Petitioners' refusal to impose restrictions on the enrichment of foreign-source uranium pursuant to section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(v), appears to rest in part upon a determination that a change in circumstances subsequent to Congressional passage of the statute has made the imposition of restrictions unwise as a policy matter. Such policy judgments are the province of Congress, not of an Executive Branch department. The proper course in such a situation is for the Executive to propose that Congress enact legislation to amend the statute.

Petitioners have also indicated that their refusal to impose enrichment restrictions pursuant to section 161(v) is the result of judgments concerning policies unconnected with the policy embodied in section 161(v) of assuring the viability of the domestic uranium industry. To the extent that the refusal rests upon such extraneous policy judgments, petitioners have acted beyond the authority granted to them by Congress. The decision of the Court of Appeals should accordingly be affirmed.

ARGUMENT

TO THE EXTENT THAT THE AGENCY'S POSITION RESTS UPON A DISAGREEMENT WITH THE CONGRESSIONAL POLICY OBJECTIVES EMBODIED IN SECTION 161(v), THE AGENCY'S POSITION SHOULD BE REJECTED.

A. The Agency May Not Disregard an Act of Congress Based Upon its Assessment of Changed Circumstances.

Petitioners, the United States Department of Energy, *et al.* ("DOE"), appear to acknowledge that their position regarding the implementation of section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(v), is inconsistent with the position taken previously by DOE's predecessor, the Atomic Energy Commission ("AEC"),

and by DOE itself until the District Court ruled against it in the instant litigation.[2] While the AEC was previously committed to impose restrictions on the enrichment of foreign-source uranium in the event that the viability of the domestic uranium mining and milling industry was threatened, DOE now takes the position that it will not impose enrichment restrictions even though DOE has determined that the industry is not viable.

Because the AEC had a monopoly position in the world enrichment market when section 161(v) was enacted in 1964, the imposition of restrictions on the enrichment of foreign uranium necessarily produced increased demand for domestic uranium and assured the viability of the domestic uranium industry. DOE is thus apparently willing to concede that, at the time the statute was enacted, Congress reasonably believed that the imposition of enrichment restrictions was a proper and effective means of assuring the viability of the domestic industry. *See* Pet. Br. at 31-33.

DOE argues that essentially different considerations are presented now that DOE has lost its enrichment monopoly. According to DOE, restrictions on the enrichment of foreign uranium would cause the price of DOE's enrichment services to rise, thereby driving "some of DOE's current customers to look elsewhere for enrichment services"; this, in turn, it is asserted, would decrease the demand for domestic uranium. Pet. Br. at 14-15. DOE has ostensibly concluded for such reasons that the imposition of restrictions would be unwise.

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[2] Thus far, petitioners have not explained in this Court the prior inconsistent agency positions detailed in Respondents' Brief in Opposition at 2-3, 12. In the Court of Appeals, DOE stated that the prior inconsisent statements of the Atomic Energy Commission "date from an era when DOE had monopoly power in the uranium enrichment services market—and ought to be evaluated in the context of that very different situation." Court of Appeals Reply Brief at 3-4 n.2 (filed Sept. 4, 1986).

To the extent that DOE's refusal to impose enrichment restrictions rests upon a determination that a post-enactment change in circumstances renders it unwise to obey the command of section 161(v), the Court should make it unquestionably clear that it is the role of Congress, not the Executive, to make such policy judgments. DOE must obey the statute until it is amended. *See Public Citizen* v. *Young*, 831 F.2d 1108, 1122 (D.C. Cir. 1987), *pet. for cert. filed sub nom. Cosmetic, Toiletry and Fragrance Ass'n* v. *Public Citizen*, No. 87-1194 (Jan. 19, 1988) (where agency believes that application of statute in light of new scientific advances "produce[s] unexpected or undesirable consequences, the agency should come to [Congress] for relief"). *Cf. TVA* v. *Hill*, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought").[3] Courts—and agencies—may not, in the process of interpreting a statute, put aside "a particular course consciously selected by the Congress" on the basis of their own "appraisal of the wisdom or unwisdom" of the Congressionally-selected course. *Id.*

In this case, Congress is mindful of the agency's concerns regarding the effects of enrichment restrictions on DOE's enrichment enterprise, and is currently considering measures designed to assure the viability of the domestic industry and to address concerns about the soundness of DOE's enrichment enterprise. The Senate Committee on Energy and Natural Resources has reported

[3] *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker"); Kendall v. United States, 37 U.S. (12 Pet.) 524, 612 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is . . . entirely inadmissible").

favorably S. 1846, a measure that would abolish section 161(v) and create a system of charges to be paid by domestic utilities for their consumption of foreign uranium; the measure would also create a Government-owned corporation to take over DOE's enrichment enterprise. S. Rep. No. 214, 100th Cong., 1st Sess. (1987). The Committee's report recognizes that "a ban on DOE enrichment of foreign uranium, as mandated by the AEA upon a finding of non-viability, may not achieve the result originally intended . . .." *Id.* at 10. Nonetheless, as the foregoing discussion makes clear, DOE is *not* free on the basis of its own policy judgments to disregard section 161(v) pending action by Congress to amend the statute.

B. The Agency May Not Refuse to Impose Restrictions for Reasons Unrelated to the Viability of the Domestic Uranium Industry.

DOE has indicated that it opposes the imposition of restrictions on enrichment of foreign uranium for reasons unrelated to questions concerning the extent of restrictions that are necessary to assure the viability of the domestic uranium industry. In its 1986 rulemaking,[4] arguing in support of its decision not to impose enrichment restrictions, DOE stated: "Notwithstanding the link between the health of the enrichment program and the use of domestic uranium, DOE has a responsibility to maintain a healthy enrichment program which transcends economic considerations." 51 Fed. Reg. at 27,137. DOE stated that its enrichment "criteria"—*i.e.*, its re-

[4] DOE's reliance on the July 29, 1986 rulemaking as support for its interpretation of section 161(v) is precluded by Pub. L. 500, 99th Cong., § 305, 100 Stat. 1783-209 (1986), which provides that "no provision" of the July 1986 rules may be used to "affect the merits of the legal position of any of the parties" concerning the meaning of section 161(v) in the instant litigation.

fusal to impose restrictions—"must take into account DOE's dual role in running the enrichment program and consider the interaction of the enrichment program with governmental policies." *Id.* The "governmental policies" identified by DOE include nuclear non-proliferation and "relationships with our trading partners." *Id.*[5]

In enacting section 161(v), Congress simply did not give the agency the discretion to base decisions about enrichment restrictions on "transcendent" considerations of the health of DOE's enrichment business, or non-proliferation, or "free trade." The only relevant policy consideration enumerated in the statute is "the maintenance of a viable domestic uranium industry." Accordingly, DOE's position that other policies and considerations apply is contrary to the statutory scheme enacted by Congress. "An agency may not confer power upon itself" to act in a manner contrary to a Congressional limitation on its action. *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986).

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[5] The strength of DOE's views regarding the desirability of a free trade policy has been made especially apparent during consideration of S. 1846, the pending legislation discussed above. Arguing in opposition to a proposed provision that would establish trade restrictions for the protection of the domestic uranium industry as an alternative to the protections of section 161(v), the Secretary of Energy stated that "the imposition of such trade restrictions would be fundamentally inconsistent with this Administration's well established commitment to free trade and competition in the world market." S. Rep. No. 214, *supra*, at 95 (letter from Secretary Herrington to Chairman of Senate Committee on Energy and Natural Resources).

CONCLUSION

DOE's position reflects a disagreement with the Congressional policy decisions embodied in section 161(v). Accordingly, the Court should reject DOE's position and affirm the decision of the Court of Appeals.

Respectfully submitted,

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